IN THE SUPREME COURT

Appeal From The Michigan Court Of Appeals
The Circuit Court For The County Of Genesee
Appealed From Judge Richard Yuille

MARIAN T. ZSIGO,

Plaintiff-Appellant,

vs.

HURLEY MEDICAL CENTER,

Defendant-Appellee.

Docket No. 126984
Court Of Appeals No. 240155
Lower Court No. 99-66504-CL

BRIEF ON APPEAL – APPELLEE

ORAL ARGUMENT REQUESTED

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STANDARD JURY INSTRUCTIONS

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COUNTERSTATEMENT OF QUESTIONS INVOLVED

I. DID THE COURT OF APPEALS CORRECTLY REVERSE THE TRIAL COURT'S DENIAL OF DEFENDANT'S MOTIONS FOR SUMMARY DISPOSITION AND DIRECTED VERDICT, AND REMAND FOR ENTRY OF A JUDGMENT OF DISMISSAL WHERE PLAINTIFF DID NOT SHOW THAT DEFENDANT'S EMPLOYEE WAS AIDED IN ACCOMPLISHING THE SEXUAL ASSAULT BY EXISTENCE OF THE AGENCY RELATIONSHIP?

Defendant-Appellee contends the answer is "Yes."
Plaintiff-Appellant contends the answers is "No."
The Michigan Court of Appeals contends the answer is "Yes."

II. DOES THE TRIAL COURT AND PLAINTIFF'S INTERPRETATION OF RESTATEMENT(2ND) OF AGENCY §219(2)(d) CONFLICT WITH TRADITIONAL AGENCY PRINCIPLES, AND WOULD IT RESULT IN EMPLOYERS BEING SUBJECT TO ALMOST LIMITLESS LIABILITY AND TORT ACTIONS?

Defendant-Appellee contends the answer is "Yes."
Plaintiff-Appellant contends the answers is "No."
The Michigan Court of Appeals did not address this question.

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STATEMENT OF JURISDICTION

Defendant-Appellee agrees with Plaintiff-Appellant's statement of appellate jurisdiction.

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COUNTERSTATEMENT OF ORDER APPEALED FROM

Defendant-Appellee, Hurley Medical Center (hereinafter "Defendant") agrees with Plaintiff-Appellant (hereinafter "Plaintiff") that the Order appealed from is the August 16, 2004 Order of the Michigan Court of Appeals Denying Plaintiff's Motion for Reconsideration of the May 4, 2004 Unpublished opinion of the Court of Appeals, which reversed the trial court's denial of Defendant's Motions for Summary Disposition and Directed Verdict.

Defendant does not agree with the remaining portions of Plaintiff's "Statement of Order Appealed From." Contrary to Plaintiff's representations, the Court of Appeals did consider the import of the trial testimony of Donna Bueche, the head nurse of Defendant's Emergency Department at the time of these events. Plaintiff also argues that the Court of Appeals failed to consider the second alleged molestation by Mr. Powell on Laura Schuman, and that the Court of Appeals misinterpreted the non-precedential opinion of the First Circuit Court of Appeals in Costos v Coconut Island Corp, 137 F3d 46 (1st Cir 1998), all of which Plaintiff contends constitute reversible error.

None of these alleged errors, however, should be legitimately considered by this Court, as follows:

- Pursuant to MCR 2.315, both the video of Ms. Bueche's testimony and the transcript thereof were made part of the court record when it was presented to the jury on January 29, 2002. It was, therefore, transmitted with the record on appeal.
- The exact portions of the transcript of Ms. Bueche's testimony that are part of Appellant's Appendix were attached as Exhibit F to Plaintiff's Brief on Appeal in the Court of Appeals.
- The import of Ms. Bueche's testimony to Plaintiff's position was discussed extensively in Plaintiff's Brief on Appeal to the Court of

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Appeals, oral argument and in Plaintiff's Motion for Reconsideration.

- Pertinent portions of Ms. Schuman's deposition testimony in the case she filed against Defendant were attached as Exhibit G to Plaintiff's Brief on Appeal in the Court of Appeals, and are also part of Appellant's Appendix.

- Defendant raised as reversible error the issue of the trial court allowing evidence regarding Mr. Powell's subsequent conduct *vis-à-vis* Ms. Schuman, which is also addressed by Plaintiff in its Brief on Appeal and at oral argument in the Court of Appeals.

- The Costos Opinion was discussed by the Court of Appeals in great detail in its May 4, 2004 Opinion.

Factually, Plaintiff's recitation of Ms. Bueche's testimony was also erroneous. Plaintiff has failed to provide this Court with Ms. Bueche's key testimony, both in the body of the motion itself and in the portions of her testimony in the Appendix. For example, Ms. Bueche clearly testified that non-employees did frequent the area in which this Plaintiff was treated. See Appellee's Appendix p 11b. Pursuant to Ms. Bueche's testimony, and as the Court of Appeals recognized, therefore, the trial court erroneously assumed Mr. Powell had access to an area away from the general public and that the Plaintiff was allegedly assaulted in an area restricted to hospital employees. Plaintiff's Statement of Order Appealed From is, therefore, both factually and legally erroneous.

The legitimacy of the Court of Appeals Opinion was recently affirmed by the decision of another panel of the Court of Appeals in Salinas v Genesys Health System, 263 Mich App 315 (2004). In Salinas, the Court of Appeals affirmed a grant of summary disposition to the Defendant in a case factually similar to the one at bar. The same issues were raised by the Plaintiff, with the Court of Appeals taking the opportunity to indicate that Restatement Agency, 2d, §219(2)(d) has **not** been adopted as a matter of Michigan law. Salinas, 263 Mich App at 318. Further, as the Court of Appeals did here,

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in Salinas the Court of Appeals also adopted the Opinion in Bozarth v Harper Creek Board of Education, 94 Mich App 351 (1979).

In a May 31, 2005 Unpublished Opinion, the Court of Appeals affirmed Salinas, supra and the Court of Appeals Decision of May 4, 2004 herein, in Caron v Wal-Mart Stores Inc, No 254915, included in Appellee's Appendix pp 26b-30b.

Defendant asserts there was no error committed by the Court of Appeals in reversing the jury verdict and remanding for entry of judgment for Defendant. Defendant requests this Honorable Supreme Court to affirm that Decision.

COUNTERSTATEMENT OF MATERIAL PROCEEDINGS AND FACTS

Defendant is compelled to file a Counterstatement to Plaintiff's "Statement of Facts and Material Proceedings Below", as Plaintiff's statement is in violation of MCR 7.212(C)(6) because it does not contain "... **all** material facts, both favorable and unfavorable". Plaintiff violates this court rule by specifically including only, "Plaintiff's version of the facts of the case" (Appellee's Appendix p 15b) and by including argument and bias. Thus, Defendant respectfully requests that its Statement of Material Proceedings and Facts be adopted.

On October 22, 1999, Plaintiff filed her Complaint against Defendant. Plaintiff's Complaint arises from events which occurred during Plaintiff's presentation to Defendant's Emergency Department on July 9, 1998. (Complaint, ¶¶ 12-20; Appellee's Appendix pp 35b-36b). Specifically, Plaintiff alleges she was sexually assaulted by a Hurley Medical Center employee, nurse's aide, Lorenzo Powell. (Complaint, ¶¶ 18-20; Appellee's Appendix pp 35b-36b).

On July 9, 1998, Plaintiff, who had been diagnosed with a bipolar disorder, was

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suffering a manic episode and was taken to the Emergency Department of Hurley Medical Center. (Appellee's Appendix p 77b). While in one of the emergency rooms, she was belligerent, kicking and screaming. (Appellee's Appendix p 78b; 86b-87b). Because of her actions, she was put in a restraint. (Appellee's Appendix p 79b).

When the nurse attempted to place a catheter, Plaintiff pulled her left arm out of the restraint and attempted to strike the nurse, whereupon security was called. (Appellee's Appendix p 80b). Plaintiff claimed she was purposely belligerent because she wanted everyone to leave the room. (Id.) At one point, she raised her exposed crotch into the air and pulled her shirt up (the nurses had tried to cover her vaginal area, without success, due to her resistance). (Appellee's Appendix pp 88b-89b). Plaintiff solicited the nurses to "look at this" and to "lick my cunt." (Appellee's Appendix p 88b). At trial, Plaintiff admitted she made these statements intentionally with the goal of disgusting the nurses to drive them away. (Appellee's Appendix p 89b; 93b). Two female nurses left Plaintiff's room temporarily but a male African-American, wearing a blue uniform, remained in the room to clean up some papers left on the floor. (Appellee's Appendix pp 93b; 81b). Later investigation revealed this individual was nurse's aide, Lorenzo Powell.

Plaintiff continued to make sexually explicit statements and gestures, purposely enticing Mr. Powell to engage in sexual activity with her. (Appellee's Appendix pp 93b-94b). Mr. Powell approached Plaintiff and put his finger inside of her vagina. (Appellee's Appendix p 82b). Plaintiff asked him if he could release her, however, he never spoke. (Appellee's Appendix pp 83b; 94b). Rather, he used gestures to indicate his intent to come back after leaving the room. Approximately five minutes later, Mr.

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Powell returned, at which point they engaged in oral sex. (Appellee's Appendix p 83b). When making the same statements to the nurses, which had included Mr. Powell initially, the Plaintiff testified she was not delusional, but did so intentionally. (Appellee's Appendix p 93b). She was never physically threatened, never resisted the sexual contact, whether verbally or physically, and did not scream, make any belligerent statement or call out to get away from him. (Appellee's Appendix pp 95b-96b). Plaintiff agreed she was a willing participant in the sexual encounter. (Appellee's Appendix pp 97b-98b; 118b-119b).

Plaintiff remained in the hospital, not telling anyone what had happened while she was in the emergency room, (Appellee's Appendix p 84b) until July 12, 1998, when Plaintiff reported the incident to the hospital's social worker. (Appellee's Appendix p 85b). The social worker contacted the police who came to Hurley Medical Center and spoke with Plaintiff; Defendant's public safety personnel were also contacted. (Appellee's Appendix p 85b).

Plaintiff spoke with Officer Hanson from the Flint Police Department. (Appellee's Appendix pp 99b; 112b). Plaintiff told Officer Hanson that she had sexual activity the day she was brought into Hurley Medical Center with a man she described as wearing a blue Hurley uniform. (Appellee's Appendix pp 113b-115b). Plaintiff explained that she was "acting very nasty," had exposed herself on numerous occasions, and told one nurse to "lick her down there." (Appellee's Appendix pp 114b-115b). She explained the nature of her encounter with Mr. Powell and further **stated that she was a willing participant in the encounter**. (Appellee's Appendix pp 116b-119b). The prosecutor decided not to pursue the case at that time.

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Verdel Duncan, Hurley's then Administrator for Cultural, Diversity, and Equal Opportunity, investigated Plaintiff's report. (Appellee's Appendix p 42b). Based upon information from Plaintiff, Mr. Duncan investigated and interviewed Hurley's male African-American environmental service personnel to determine whether any of these individuals were the perpetrator; however, none of them fit Plaintiff's description. (Appellee's Appendix pp 44b-45b; 48b). He then contacted Plaintiff and indicated the investigation was ongoing. (Appellee's Appendix p 49b).

On August 26, 1998, Mr. Duncan learned that a complaint was made by Laura Schuman, a female patient who had been in restraints in the emergency room. (Appellee's Appendix pp 50b-51b). Apparently, while restrained, Ms. Schuman had been fondled and asked to perform fellatio. (Appellee's Appendix pp 52b-53b). Additionally, this individual called Ms. Schuman at home, and the name and telephone number for Lorenzo Powell were shown on her caller ID. (Appellee's Appendix pp 54b-55b).

After talking with Ms. Schuman, Mr. Duncan called Plaintiff. He assumed that the same person perpetrated both events. (Appellee's Appendix pp 57b-59b). In both circumstances, both victims were in the emergency room, restrained, having psychiatric episodes and made complaints regarding oral sex. (Appellee's Appendix p 59b-62b).

Mr. Duncan met with Plaintiff on September 4, 1998. (Appellee's Appendix p 63b). At that meeting, he presented Plaintiff with photographs of ten African-American males, which he had received from Hurley's Public Safety Department. (Appellee's Appendix p 64b; 72b). Plaintiff then identified Mr. Powell. (Appellee's Appendix p 74b). Mr. Powell denied the sexual allegations as to both women.

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At the time of the incident, Mr. Powell was a nurse's assistant in Hurley Medical Center's Emergency Department. (Appellee's Appendix pp 75b; 5b). As a nursing assistant, he did many ancillary jobs to assist the registered nurses. Obviously, the duties of a nurse's assistant did not include sexual contact of any kind with a patient. (Appellee's Appendix pp 75b; 13b).

Non-employee visitors were permitted to attend patients in the Emergency Department, including the room in which Plaintiff was treated. (Appellee's Appendix p 11b).

Count I of Plaintiff's Complaint alleged that Hurley Medical Center was negligent when hiring Mr. Powell as an employee. (Complaint, ¶¶ 29-37; Appellee's Appendix pp 37b-38b). Count II of Plaintiff's Complaint, a purported "negligence claim" alleged that Defendant had a duty to provide Plaintiff safe treatment and breached this duty by placing Plaintiff in a vulnerable position, and further breached its duty of care by failing to monitor and check on Plaintiff while in restraints. (Complaint, ¶¶ 38-44; Appellee's Appendix pp 38b-39b). Counts III and IV of Plaintiff's Complaint were entitled "Assault and Battery" and "Intentional Infliction of Emotional Distress." (Complaint, ¶¶ 45-55; Appellee's Appendix pp 39b-40b). In Count III, Plaintiff claimed that Hurley Medical Center should be held vicariously liable for the purported sexual assault committed by Mr. Powell, because he was acting within the scope and course of his employment. (Complaint, ¶¶ 45-49; Appellee's Appendix p 39b). Likewise in Count IV, Plaintiff contended that Defendant should be vicariously liable for an intentional infliction of emotional distress committed against her by Mr. Powell. (Complaint, ¶¶ 50-55 Appellee's Appendix pp 39b-40b).

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On March 19, 2001, Defendant filed its Motion for Summary Disposition on Plaintiff's Complaint. Hurley argued that Count I of Plaintiff's Complaint should be dismissed, and produced evidence showing that it had conducted an investigation of Mr. Powell prior to his hire, including a criminal background check that came back clean, as well as numerous positive references from his former employers. (Appellee's Appendix pp 160b-167b). Additionally, Defendant argued that Count II of Plaintiff's Complaint should be dismissed as Plaintiff failed to comply with the requirements of MCL 600.2912b and MCL 600.2912d, by failing to provide a Notice of Intent, and failing to file an Affidavit of Meritorious Claim with her Complaint. (Appellee's Appendix pp 167b-172b). Subsequently, Plaintiff stipulated to dismiss, with prejudice, Counts I and II of her Complaint, and an Order of Dismissal was entered on March 23, 2001.

Defendant also argued that it was entitled to summary disposition on Counts III and IV of Plaintiff's Complaint, asserting that under Michigan law, it could not be held vicariously liable for Mr. Powell's *ultra vires* acts. (Appellee's Appendix pp 172b-176b). In support of its motion, Defendant cited paragraph 10 of Plaintiff's Complaint which alleged: "At all pertinent times, Powell was acting within the course and scope of his employment with Defendant." (Defendant's Motion for Summary Disposition at ¶4, Appellee's Appendix p 152b; Complaint at ¶ 10, Appellee's Appendix p 35b).

The court originally scheduled discovery cutoff for August 13, 2000, and dispositive motion cutoff for September 25, 2000. It extended discovery until December 31, 2000, per its Order dated November 2, 2000, but held in abeyance the decision to extend dispositive cutoff. Instead, it took the unusual step of requiring a submission of a synopsis of what the motion would entail. It ruled that it would inform the Defendant if it

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would allow the motion after reviewing the synopsis. Defendant filed its synopsis on December 6, 2000, but the court never responded. At a chance encounter on another matter, defense counsel inquired of the court as to its intent in hearing the motion. The court stated it would not hear the motion. When asked why, the court stated it "did not want to."

Trial first commenced on Friday, March 23, 2001, at which time a jury was selected. On Tuesday, March 27, 2001, the second day of trial, after reading the decision in Bozarth v. Harper Creek Board of Education, 94 Mich App 351 (1979), the trial court advised defense counsel and his client, William D. Smith, Esq., Vice-President and General Counsel of Hurley Medical Center, that it was highly unlikely any Court of Appeals panel would uphold a denial of the Motion for Summary Disposition. The trial court stated to counsel and Mr. Smith in chambers, but not in the presence of Plaintiff's counsel, that it would mis-try the case and grant its Motion for Summary Disposition, although it would set the matter down for a hearing and allow the Plaintiff an opportunity to make a record. (Appellee's Appendix pp 219b-220b; 221b-222b). Judge Yuille, on the record, acknowledged making his conclusions known to counsel and did in fact declare a mistrial and discharge the jury. (Appellee's Appendix pp 224b-225b).

Instead of setting the motion for hearing within the next week or two as represented, the trial court did not hear the Motion until July 24, 2001. After hearing oral argument, the court advised it would not make its ruling that morning, but would go on the record sometime after 5:00 p.m. on that date to give his opinion. The court would not say specifically when. Instead, it put the matter on the record on the morning

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of July 27, 2001, without advising defense counsel. That opinion was formalized in an Order dated August 6, 2001, which incorporated the ruling put on the record on July 27, 2001, and which depicted Defendant's Motion contrary to its representation at the time of the mistrial.

On August 27, 2001, Defendant timely filed its Application for Leave to Appeal the trial court's August 6, 2001 Order. Concurrently, Defendant filed a Motion for Immediate Consideration of Application for Leave to Appeal. On October 4, 2001, the Court of Appeals, in a 2-1 decision, entered its Order granting immediate consideration and denying leave to appeal. The trial of this matter was rescheduled for November 15, 2001.

By notice dated November 14, 2001, trial was rescheduled for January 23, 2002. The matter was tried January 23-24, 29, 30-31, February 1, 4, 2002. The jury found in favor of the Plaintiff and judgment was entered February 25, 2002.

Defendant timely filed its Claim of Appeal on March 13, 2002. In an Unpublished, *Per Curiam* Opinion of May 4, 2004, the Court of Appeals reversed the jury verdict and remanded for entry of judgment on behalf of Defendant, finding Defendant not liable under a theory of *respondeat superior*, and further holding that the trial court erred in denying Defendant's motions for summary disposition and directed verdict. The Court of Appeals specifically held that Plaintiff did not show that Powell's sexual assaults were "accomplished by an instrumentality, or through conduct associated with the agency status" per Restatement Agency, 2d, §219(2)(d), but merely showed that Powell's employment relationship with Defendant provided him with an opportunity for tortious activity. Plaintiff, therefore, failed to present a material question

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of fact regarding Defendant's liability under the doctrine of *respondeat superior*.

On May 12, 2004, Plaintiff filed a Motion for Reconsideration in the Court of Appeals, arguing primarily that the Court of Appeals did not consider the import of the trial testimony of Nurse Bueche. While Plaintiff also argued that the Court of Appeals failed to consider the second alleged molestation by Mr. Powell on Laura Schuman, and that the Court of Appeals misinterpreted the non-precedential opinion in Costos, supra, those lesser arguments did not appear as significant to the Plaintiff as the argument concerning the "failure" to consider Ms. Bueche's testimony.

Defendant answered the Motion for Reconsideration, arguing that none of these alleged errors constituted "palpable error", and demonstrating that the entirety of Plaintiff's Motion for Reconsideration contained arguments which were either erroneously premised or which Plaintiff previously made.

In a 2-1 decision, the Court of Appeals ordered on August 16, 2004 that the Motion for Reconsideration be denied.

On August 19, 2004, the Court of Appeals released its for publication Opinion in Salinas v Genesys Health System, 263 Mich App 315 (2004). That opinion specifically affirmed the trial court's grant of summary disposition to defendant in a factual situation remarkably similar to the case at bar, and also clarified that Restatement Agency, 2d, §219(2)(d) has not been adopted as a matter of Michigan law, and refused to do so in the case. It also found the holding of Bozarth, supra, to be persuasive and adopted it as its own.

On September 9, 2004, Plaintiff filed Application for Leave to Appeal to this Honorable Court, which was granted on May 12, 2005.

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ARGUMENT

I. THE COURT OF APPEALS CORRECTLY REVERSED THE TRIAL COURT'S DENIAL OF DEFENDANT'S MOTIONS FOR SUMMARY DISPOSITION AND DIRECTED VERDICT, AND REMANDED FOR ENTRY OF A JUDGMENT OF DISMISSAL IN THE CONTEXT OF AN *ULTRA VIRES* ACT WHERE PLAINTIFF DID NOT SHOW THAT DEFENDANT'S EMPLOYEE WAS AIDED IN ACCOMPLISHING THE SEXUAL ASSAULT BY EXISTENCE OF THE AGENCY RELATIONSHIP, AND WHERE THE RESTATEMENT SECTION AT ISSUE HAS NOT BEEN ADOPTED AS A MATTER OF MICHIGAN LAW.

Standard of Review

Appellate review of a Motion for Summary Disposition is *de novo*. Citizens Insurance Co. of America v Buck, 216 Mich App 217 (1996). See also, Smith v Globe Life Insurance Co., 460 Mich 446 (1999).

Appellate review of a motion for directed verdict or judgment notwithstanding the verdict is *de novo*, and the evidence and inferences shall be viewed in the light most favorable to the non-moving party. Chiles v Machine Shop, Inc., 238 Mich App 462 (1999).

The decision to admit or exclude evidence is within the discretion of the trial court. Accordingly, it is reviewed under an abuse of discretion standard. People v Bahoda, 448 Mich 261 (1995).

A. Summary of Argument.

This factual scenario is clearly illustrative of a circumstance in which an employer should not and cannot be held liable for the acts of an employee and still retain any concept of an *ultra vires* act exempting the employer from vicarious liability for its employee. If Hurley Medical Center is held vicariously liable for the alleged sexual activity of its employee under the circumstances of this case, it will be tantamount to

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adopting strict liability for **any** act committed by an employee while at work. Bear in mind that the sole legal theory ultimately asserted in this action was one of *respondeat superior* for the alleged sexual activity between the Plaintiff and Mr. Powell in the emergency department.

In pursuing this theory, Plaintiff acknowledged that sexual contact with a patient was certainly not within the normal job description and, therefore, scope of employment, of a nurse's aide. Appellant's Appendix p 5a. Even the trial court held as a matter of law that the alleged conduct was outside the scope of employment. (Appellee's Appendix p 257b). And, of course, at trial, the nursing manager who hired Mr. Powell confirmed that any sexual contact with a patient would certainly be outside the scope of any conceivable duty or responsibility of a nurse's aide. (Appellee's Appendix pp 322b; 13b).

This important concession severely and legitimately limits the scope of this Appeal to the issue of whether Restatement Agency, 2d, §219(2)(d), is or should be adopted as a matter of Michigan law, and if so, whether Mr. Powell was "aided in accomplishing" the sexual assault solely for virtue of being present on the premises to do the job for which he was hired.

It is Defendant's contention that Restatement Agency, 2d, §219(2)(d) should **not** be adopted for intentional physical torts and torts not involving reliance and deceit (see Argument II, infra). Even if adopted, the factual circumstances of this case do not rise to the level contemplated by Restatement Agency, 2d, §219(2)(d) for there to be more than "mere opportunity" for the employee to commit the tortious act so as to meet the requirement of "aided by the agency relation" standard in any event.

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B. The Court of Appeals Opinions in Salinas and Bozarth are Dispositive.

The Court of Appeals below analyzed existing law and concluded, on page 8 of the Opinion, that Restatement Agency, 2d, §219(2)(d) applies to actions in tort. (Appellant's Appendix p 119). This statement and the published Opinion appears in conflict with the Court of Appeals' analysis of Restatement Agency, 2d, §219(2)(d) in both Salinas, supra, and Bozarth, supra. Those cases evidence the more persuasive holding that determined that Restatement Agency, 2d, §219(2)(d) has not been adopted as a matter of Michigan law (Salinas) and dismisses the applicability of it (Bozarth). Both Salinas and Bozarth are "on all fours" with and dispositive of the factual scenario here.

In Bozarth, Plaintiff, an elementary school student, was homosexually assaulted by his sixth grade teacher. The mother sued the board of education on behalf of her son, alleging both negligent hiring, supervision and vicarious liability under the doctrine of *respondeat superior*. She specifically alleged that the teacher was acting within the scope of his employment and in furtherance of the school board's business when the homosexual attacks occurred. Bozarth, 94 Mich App at 353 n.1.

The trial court granted summary disposition. In affirming, the Court of Appeals held it was "clearly outside the scope of the teacher's employment.... The *respondeat superior* doctrine, therefore, does not apply in such a situation to subject the governing school board to liability." Bozarth, 94 Mich App at 353, citing 1 Restatement Agency 2d, §219, p 481; McCann v State of Michigan, 398 Mich 65, (1976). The Bozarth court dismisses the applicability of §219(2)(d):

> It is plaintiff's argument that a jury must be allowed to

> determine whether Mixson "was aided in accomplishing the tort by the existence of the agency relation." Plaintiff has cited no cases in which this subsection of the Restatement has been applied as now urged by plaintiff. In our view, proper application of the principle of liability enunciated in the subsection is limited to situations where, from the viewpoint of the person being harmed, the agent appears to have been acting within the scope of his employment. Bozarth, 94 Mich App at 354.

The Bozarth court concluded:

> **We are not persuaded that any factual development of plaintiff's allegations under Count II could justify recovery against defendant school board under the doctrine of *respondeat superior*. A teacher's homosexual assaults on his student constitute conduct clearly outside the scope of the teacher's employment and outside the teacher's apparent authority. The mere fact that an employee's employment situation may offer an opportunity for tortious activity does not make the employer liable to the victim of that activity. Summary judgment on Count II was, therefore, properly entered in favor of defendant school board.** [Emphasis added] Bozarth, 94 Mich App at 355.

The Court of Appeals in Bozarth, therefore, did **not** adopt the Restatement Agency, 2d, §219(2)(d) in Michigan. Instead, it upheld the general rule of law that an *ultra vires* action by an employee cannot make the employer liable under *respondeat superior* theories.

Likewise, in Salinas a similar result was reached, with the Court of Appeals specifically **declining** to apply Restatement Agency, 2d, §219(2)(d) to facts remarkably similar to the case at bar. The Court of Appeals also took the opportunity to indicate that Restatement Agency, 2d, §219(2)(d) had not been adopted as a matter of Michigan law.

In Salinas, Plaintiff was admitted to the Defendant hospital's Intensive Care Unit

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in a "diminished physical state" due to the medication she was receiving. She alleged she was sexually assaulted by a registered nurse employed by the Defendant, and argued Restatement Agency, 2d, §219(2)(d) as the basis for liability against the Defendant hospital. Salinas, 263 Mich App at 316-317. Unlike the trial court here, in Salinas, the trial court granted summary disposition to the Defendant. Id.

In discussing Restatement Agency, 2d, §219(2)(d), the Court of Appeals in Salinas stated:

> Plaintiff argues that this exception has been adopted as a matter of Michigan law and that it applies to the facts of this case. We disagree. Salinas, 263 Mich App at 318.

In supporting this argument, the Salinas panel not, coincidentally, agreed with Defendant's position herein that this Court's Opinion in Champion v Nation Wide Security, Inc., 450 Mich 702 (1996) does **not** support the position that Restatement Agency, 2d, §219(2)(d) applies in Michigan. The Salinas court properly determined that Champion is inapposite to its factual situation because Salinas did not involve Civil Rights Act allegations and situations where subservient employees are subject to the whims of employers or supervisors. The Salinas court stated:

> Further, we question whether Champion generally "adopted" the Restatement exception to the usual rule that an employer cannot be held liable for torts intentionally committed by an employee. The only mention of the Restatement exception was made in passing, in a footnote.... **We are unconvinced that this constituted an adoption of the Restatement exception, especially for cases like the present one involving tort actions not at issue in Champion.** [Emphasis added] Salinas, 263 Mich App at 320.

In rejecting the argument that Restatement Agency, 2d, §219(2)(d) has been adopted as a matter of Michigan law, the Salinas court stated with regard to the specific facts of

that case:

> In any event, we need not decide whether the Restatement exception has been or should be recognized because the facts here would not support its application in any event. Plaintiff alleges only that the nurse's relationship with defendant enabled him to be alone and unsupervised with her at the time and place of the assault. This court has held that an employee is not "aided in accomplishing the tort by the existence of the agency relation," under the Restatement exception, just because of the "mere fact that an employee's employment situation may offer an opportunity for tortious activity." Bozarth v Harper Creek Board of Ed, 94 Mich App at 354-355, 288 NW2d 351 (1979). Salinas, 263 Mich App at 320-321.

In other words, the Salinas court specifically affirmed and adopted the holding in Bozarth, supra. Simply providing opportunity for an employee to commit an *ultra vires* act is not a sufficient basis to bind the employer under *respondeat superior* theories.

The Court of Appeals in Salinas also took particular note that its holding there, and in Bozarth, was consistent with the United States Supreme Court analysis in similar cases. Id. See also, Argument II, infra.

Whether sexual assault, as in Salinas and Bozarth, or consensual sexual activity, as here, it is equally inconceivable that the alleged occurrence under any of these circumstances can be imputed to the employer. It was obviously not within the scope of Mr. Powell's employment, nor within any conceivable apparent authority, for him to so act. The fact that he did it while "at work" cannot form the legal foundation of attaching vicarious liability without eviscerating the entire legal premise of exception for *ultra vires* acts and adopting strict liability.

Most recently, the Court of Appeals again considered Restatement Agency, 2d, §219(2)(d), and its inapplicability, in Caron v Wal-Mart Stores, Inc., CA No. 254915,

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May 31, 2005. (Appellee's Appendix pp 28b-32b). There, the Plaintiff had a friend take nude photographs of her and then brought the roll of film to a Wal-Mart photo department to have it developed. The Wal-Mart employee who developed the film apparently allowed other individuals to see them. Defendant moved for summary disposition, which the trial court granted and which was affirmed by the Court of Appeals. (Appellee's Appendix p 28b).

One of the arguments made on appeal by plaintiff was that Wal-Mart was liable because the employee was aided in accomplishing the tort by the existence of the agency relationship because without Wal-Mart's equipment and training, the employee would not have been able to commit the tort. (Appellee's Appendix p 29b). In discussing this theory, the Court of Appeals indicated that plaintiff's argument assumed that Restatement Agency, 2d, §219(2)(d) had been adopted in Michigan. In response, the court indicated that it is unclear whether Michigan has adopted this exception, particularly for cases involving tort actions, and cited Salinas, supra. (Appellee's Appendix p 30b). The Court of Appeals stated:

> Moreover, even if Michigan did recognize such an exception, it would not apply to the facts of this case because the relationship here merely provided Gilbert (the employee) with the opportunity to commit the tort, and the "mere fact that an employee's employment situation may offer an opportunity for tortious activity" does not mean that he "was aided in accomplishing the tort by the existence of the agency relation" for purposes of the Restatement exception. Id.

The Court of Appeals very clearly indicated that, "for the Restatement exception to apply, there must be something more than mere opportunity – the agency itself must empower the employee to commit the tortious conduct." Id.

In discussing the particular facts of the case to Restatement Agency, 2d,

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§219(2)(d), the Court of Appeals in Caron stated:

> In this case, Wal-Mart did not empower or authorize Gilbert to make copies of plaintiff's photos. To the contrary, Wal-Mart had an established policy forbidding its employees to reproduce customer's photos and stating that the photos are at all times the property of the customer. Further, Wal-Mart did not vest any authority in Gilbert to give him the power to accomplish the tort of reproducing plaintiff's photos without her permission. Rather, Wal-Mart merely provided Gilbert with the opportunity to reproduce plaintiff's photographs. Therefore, even if the "aided in accomplishing the tort" Restatement exception was recognized in Michigan, it would not be applicable to this case. (Appellee's Appendix pp 30b-31b).

It can certainly be argued that the employee in Caron who was directly responsible for reproducing the photos, the job to which he was employed, could more directly bind the employer for his tortious activity than the teacher in Bozarth, the nurse in Salinas, or the nurse's aide here. Yet the Court of Appeals properly refused to extend liability under this circumstance.

So by what legal sophistry does the Plaintiff now seek reversal of the Court of Appeals Decision? Plaintiff does so by choosing to disregard the obvious applicability of the above-cited cases; by erroneously applying the Restatement Agency, 2d, §219(2)(d) exception; and by misinterpreting and misapplying Champion, supra and Costos, supra.

Each of these bases can be easily disposed as follows:

- The Restatement Agency, 2d, §219(2)(d) exception has **not** been adopted for **all** tort activities in Michigan;
- Bozarth and Salinas rejected the applicability of the Restatement Agency, 2d, §219(2)(d) exception;
- Champion only interpreted a particular area of sexual harassment law under the Michigan Civil Rights Act, and neither *quid pro quo* sexual harassment nor constructive discharge are issues in this case;

- Costos is factually distinguishable because there the tortious activity was accomplished by an instrumentality (the entrustment to the night manager with the master key) and through conduct associated with the agency status (capacity to enter a specific room otherwise off limits to all but the occupant).

It is Defendant's position that Plaintiff has failed to demonstrate through any legal analysis that the Court of Appeals Opinion was improper or ill-founded.

C. Nurse Bueche's Testimony Was Properly Considered and Does Not Support Plaintiff's Position.

The gravamen of Plaintiff's Brief is that the Court of Appeals did not consider the import of the trial testimony of Donna Bueche, the head nurse of Defendant's Emergency Department at the time of these events. As stated above, both the video of Ms. Bueche's testimony and the transcript thereof were made part of the Court record when it was presented to the jury on January 22, 2002. Moreover, the exact portions of the transcript of Ms. Bueche's testimony that are part of Plaintiff's Appendix, were attached as Exhibit "F" Plaintiff's Brief on Appeal (parenthetically, it should be noted that Plaintiff did not attach the entire transcript of Ms. Bueche's testimony, choosing instead to only provide portions. This, in and of itself, should raise the eyebrows of this Court).

Moreover, the import of Ms. Bueche's testimony to Plaintiff's position was discussed extensively in Plaintiff's Brief on Appeal, at oral argument and in the Motion for Reconsideration.

Plaintiff has failed to provide this Court with Ms. Bueche's key testimony, both in the Brief itself and in the portions of her testimony made part of Plaintiff's Appendix. Ms. Bueche clearly testified, for example, that **non-employees did frequent the area** in which this Plaintiff was treated:

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Q. Were visitors allowed into the area of the ER?

A. Yes. I mean you could have one -- you could have two people with each patient.

Q. Including the room that was allegedly involved in this case?

A. If she would have had family members with her they would have been allowed back.

Q. So this area is not restricted to employees only correct?

A. I mean, the visitors would be with those patients that they belonged with. And you like I said many times we had patients in the hall so you'd have hallway patients too.

Q. So it was not unusual to have non-employees frequent this whole area; isn't that true?

A. In the hall, walking, yes.

Q. And visiting non-employees visiting patients in the rooms as well wherever the patients were.

A. Right, right.

Q. This was not a special room that she was in, allegedly that she was in in this case was it?

A. No.

Q. In terms of the type of patient she was or in terms of access by visitors or anybody else?

A. No.

(Appellee's Appendix p 11b).

Pursuant to Ms. Bueche's testimony, and as the Court of Appeals recognized, therefore, the trial court erroneously assumed Mr. Powell had access to an area away from the general public and that the Plaintiff was allegedly assaulted in an area restricted to hospital employees.

Plaintiff also "half quotes" Ms. Bueche's testimony, in particular at page 18 of the

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Brief in what can only be considered a blatant attempt to mislead this Court. At page 18, Plaintiff states: "Bueche testified that a non-employee would **not** be able to enter Plaintiff's room." [Emphasis in original]. This is a completely misleading quote inasmuch as the question that was asked during that portion of her testimony concerned **cleaning** the room:

> Q. And would a non-employee of Hurley Medical Center have been able to enter that room and do what Mr. -- **and clean the room**?
>
> A. No.
>
> [Emphasis added] (Appellee's Appendix pp 6b-7b).

In fact, Nurse Bueche stated that **anyone** can go into a room in the Emergency Department because the rooms are not locked, although that usually did not happen. Id.

Ms. Bueche further testified with regard to nurse's aides in the emergency room:

> Q. Would it be a **normal** part of their everyday responsibilities to have -- to be able to go to different areas in the ER to help the nurses attend those patients?
>
> A. Yes.
>
> Q. And that was simply a day-to-day routine, part of their duties; is that correct?
>
> A. Yes, yes.
>
> Q. Would you associate the words power or authority with regard to any function they had as nurse's aides over any other healthcare providers?
>
> A. No, I don't think so. When you are saying power, you mean power of how much their care --
>
> Q. That was inherent in their duties and responsibilities because they have -- would you use the word power or authority in terms of -- by virtue of their position, they have the authority or power over others?

A. No, no, and they didn't direct. I mean, they didn't direct any care.

[Emphasis added] (Appellee's Appendix p 11b).

Mr. Powell, therefore, was properly in the patient's room as part of his job to first help restrain her and then to clean up after her. These were both legitimate parts of his job. Not only nurse's aides, but non-employee visitors, all healthcare providers in the emergency department, security guards, etc., had access to the room at issue. What, therefore, was "special" or the "something more" that would suggest the hospital "aided" Mr. Powell in commission of the tortious act, as the case law requires if the Restatement Agency, 2d, §219(2)(d) exception is applicable? By virtue of the job itself, the hospital did not "empower" Mr. Powell in any way to commit this blatant or *ultra vires* intentional tort.

The fact that the Court of Appeals did not specifically cite Ms. Bueche's testimony is an insufficient basis to now argue to this Court that it was never considered. See, e.g., Hutchins v Kimmell, 31 Mich 126 (1875), which held that reconsideration will not be granted for the purpose of giving an opportunity of arguing a question which, **although not discussed in the opinion delivered**, did not escape the observation of the court, and was the subject of its deliberation and investigation. In fact, nowhere in the Court of Appeals opinion is there any **specific** reference to anyone's testimony or evidence presented, as is appropriate and often the case in opinions of this type following lengthy jury proceedings.

In short, Nurse Bueche's testimony was appropriately considered by the Court of Appeals. Further, it does not stand for the proposition that Plaintiff contends. All of her testimony establishes that numerous individuals had access to the room where

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Ms. Zsigo was placed. Providing a "mere opportunity" for commission of a tortious act is not sufficient to impose vicarious liability upon an employer for an employee's *ultra vires* act.

D. The Trial Court Misinterpreted the Restatement Exception to Impose Strict Liability.

Aside from Bozarth and Salinas, which made quite clear the inapplicability of §219(2)(d) to a factual circumstance in which neither an employer/employee relationship existed between Plaintiff and Defendant, the appellate courts of Michigan have addressed this section in other contexts.

In McCalla v Ellis, 180 Mich App 372 (1989), the plaintiff was hired by the defendant to sell vacuum cleaners door-to-door and was plaintiff's direct supervisor. One day the defendant supervisor asked her to come to the office to sign some contracts. When she arrived, she found herself alone with him. As she signed the papers, he ordered her to remove her clothes and engage in sexual intercourse. He stated that if she "stuck with him, she'd have no worries." She brought a civil rights *quid pro quo* sexual harassment claim, one of whose elements is to establish that the perpetrator was an agent of the Defendant employer. The Court, citing the Restatement Agency, 2d, §219(2)(d) exception (even prior to Champion) held the claim viable as the defendant clearly utilized his supervisory position to get what he wanted. McCalla, 180 Mich App at 379.

McCalla clearly illustrates why the Restatement Agency, 2d, §219(2)(d) exception is not applicable here. There is no employer/employee relationship between Plaintiff and Mr. Powell which would make Champion and/or McCalla applicable. There was not even a claim that it was within the apparent authority of Mr. Powell, as a

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nursing assistant, to take Plaintiff up on her sexual advances.

Over objection, the trial court here instructed the jury setting forth the Restatement Agency, 2d, §219(2)(d) language as follows:

> The employee was aided in accomplishing the wrongful conduct by the existence of the employment relationship. (Appellee's Appendix p 140b).

This was tantamount to directing a verdict for the Plaintiff. How could a jury, applying that instruction, not find for the Plaintiff? Mr. Powell certainly would not have been on the premises, or in the Emergency Department room, if he were not employed as a nurse's aide. This instruction does not define "aid" but, how could any juror conclude that Mr. Powell was not "aided" in engaging in the sexual activity but for the existence of his employment relationship? He simply would not have been there and been solicited by this patient but for his job. Yet, if that is truly the test, one cannot conceive of a factual scenario in which an employer would not be held liable for **any** act by an employee committed while that employee is on the job, irrespective of whether it was within the scope of his authority. Certainly, the teacher in Bozarth was on the job and would not have had access to the student but for the teacher/student relationship; nor the nurse in Salinas; nor any employee at his place of work. Under this definition, the State of Michigan would be automatically held liable if a clerk of the Court who had heard one argument too many, pulled out a gun and shot all of the attorneys during oral argument. Mr. Powell's alleged sexual assault is simply indistinguishable from such a scenario.

Plaintiff's attorney took full advantage of this instruction by arguing repeatedly during closing argument that the mere existence of Mr. Powell's job, in giving him

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access to the room, constituted being aided in accomplishing the tort by the existence of the employment relationship. (Appellee's Appendix pp 132b-137b).

Finally, Costos, supra, is a Maine case which applies and interprets Maine law, has no precedential effect. It is nonetheless inapposite to the factual scenario here. This was appropriately recognized by the Court of Appeals, and it is inconceivable that Plaintiff would suggest an alternate interpretation and analysis.

While the trial court chose to ignore the unchallenged proof at trial from Ms. Bueche that non-employees frequented the area in which Plaintiff was treated (Appellee's Appendix p 11b), the Court of Appeals properly did not. Plaintiff's contention that Mr. Powell's "omnibus" activity falls within the parameters of the Restatement Agency, 2d, §219(2)(d) exception is not supported both legally and factually, and the Court of Appeals correctly determined that there was nothing in Mr. Powell's job, as it was provided to him by Defendant, that would make the Defendant liable for his outrageous actions.

Interestingly, in the Court of Appeals, Plaintiff suggested that the United States Supreme Court case of Burlington Industries, Inc. v Ellerth, 524 US 742 (1998), was supportive of her position regarding the applicability of the Restatement Agency, 2d, §219(2)(d) exception. As the Court of Appeals panel here and in Salinas, supra, recognized, the Burlington Opinion actually supports Defendant's position that Restatement Agency, 2d, §219(2)(d) is inapplicable to a factual circumstance in which no employer/employee relationship existed between the Plaintiff and Defendant. Salinas, 263 Mich App at 321-323. In other words, Restatement Agency, 2d, §219(2)(d) does not apply absent an employment relationship.

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In Burlington, Plaintiff filed suit against Defendant Burlington Industries for ongoing and consistent sexual harassment by one of her supervisors. Comments made by the supervisor included those regarding her appearance, including comments regarding her, "breast, butt and legs", comments regarding her attire and a warning to Plaintiff if she did not "loosen up" the supervisor could, "make [her] life very hard or very easy at Burlington." Burlington, 524 US 742, 748.

The issue before the Court was Burlington Industries liability for this longstanding sexual harassment. In its analysis, the Court cited Restatement Agency, 2d, §219(1), which provides that a master is subject to liability for the torts his servant committed within the scope of employment. Burlington, 524 US at 758. The Court further pointed out that according to Restatement Agency, 2d, §219(2)(d), to be within the scope of employment the action must be taken "at least in part, by a purpose to serve the [employer], even if it is forbidden." Id.

The Supreme Court took the position that in cases of supervisor harassment, it was improper to impute liability to the employer. In doing so, the Court cited to Restatement Agency 2d, §219(2)(d) as establishing a basis for vicarious liability against an employer in cases based upon supervisor harassment. Id. In analyzing the "aided in the agency relationship" standard the United States Supreme Court stated:

> **In a sense, most workplace tortfeasors are aided in accomplishing their tortious objective by the existence of the agency relation:** proximity and regular contact may afford a captive pool of potential victims. Were this to satisfy the aided in the agency relation standard, an employer would be subject to vicarious liability not only for all supervisor harassment, but also for all coworker harassment, a result enforced by neither the EEOC nor any Court of Appeals to have considered the issue. **The aided in the agency relation standard, therefore, requires the existence of something more than the employment relationship itself.** [Citation omitted] [Emphasis added] Burlington, 524 US at 760.

As the Court of Appeals here recognized, the "something more" that the Supreme Court referred to was the supervisor's ability to make tangible employment decisions effecting the subordinate employee. The Supreme Court pointed out only a supervisor or a person acting within the authority of the company has the power to take tangible employment action which will inflict direct **economic** harm. Burlington, 524 US at 762.

It is for these reasons that the Court found that Restatement Agency, 2d, §219(2)(d) "aided in the relation" standard applied to supervisor harassment, and not to harassment by co-workers, because tangible employment actions fall within the special province of the supervisor.

This analysis was appropriately recognized by the Court of Appeals below (Appellant's Appendix p 12a) and in Salinas, supra. Clearly, Hurley Medical Center did not empower Mr. Powell to commit the alleged heinous act. As the testimony demonstrates, instead, Mr. Powell had no supervisory authority over anyone. Bueche, supra. The Burlington analysis is directly applicable here, therefore, where proximity and contact with fellow employees (or patients) who might be subjected to sexual misbehavior is insufficient.

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The Court of Appeals opinion was correct.

E. The Trial Court Committed Reversible Error When it Allowed the Jury to be Presented With Evidence Regarding Mr. Powell's Subsequent Conduct, Hurley Medical Center's and The Police Department's Subsequent Investigations, and When it Allowed The Edited Deposition of Mr. Powell to be Read to The Jury.

The other primary basis for Plaintiff's appeal is that the Court of Appeals, according to the Plaintiff, did not appropriately consider in its Opinion the effect of Mr. Powell's subsequent conduct, *i.e.*, the Schuman incident.

Defendant contends that the trial court erred when it allowed Plaintiff to introduce evidence regarding the Schuman incident as well as the investigations made of Plaintiff's complaint of sexual harassment. (Appellee's Appendix pp 146b-147b; 150b). Neither the Schuman incident, nor the subsequent investigations, are relevant to this action.

The trial court erred and Defendant was severely prejudiced when the court allowed Mr. Powell's deposition testimony to be read to the jury. The whole of Mr. Powell's testimony was the assertion of his Fifth Amendment privilege against self-incrimination to all questions posed regarding both Plaintiff and Ms. Schuman. (Appellee's Appendix pp 18b-27b). This testimony was admitted by the trial court as rebuttal, but it rebutted nothing because Hurley never offered evidence regarding Mr. Powell's prior denials of involvement. (Appellee's Appendix pp 120b-122b). Due to the nature of the testimony, a presumption would be made by the jury that Mr. Powell was "guilty" of the alleged harassment a presumption that Hurley had no opportunity to rebut through cross-examination. Further, when Hurley requested the trial court allow it to re-open its proofs, to address this testimony, this request was denied. (Appellee's Appendix p 123b).

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Prior to trial, the trial court ruled it was granting Defendant's Motion to Exclude the Testimony of Lorenzo Powell. (Appellee's Appendix p 148b). The court explained that its decision was made upon the condition that there would be no argument by Hurley Medical Center that "we did not hear from Mr. Powell" and "we don't know what he would have said." (Appellee's Appendix p 148b). Defendant stringently complied with the trial court's limitation. The trial court ruled that because Hurley defended the case by offering testimony on the element of consent, however, it was reversing its decision and allowed Mr. Powell's testimony in as rebuttal. (Appellee's Appendix p 120b).

What follows, therefore, is a brief legal analysis of why the trial court erred, in its totality, in allowing evidence of the Schuman incident and its aftermath, and Mr. Powell's deposition.

1. Hurley Was Prejudiced When the Court Allowed Mr. Powell's Deposition Testimony Into Evidence.

Under MRE 403, unfair prejudice encompasses two concepts which were set forth by the Court of Appeals in Sclafani v Cusimano, Inc, 130 Mich App 728 (1983). These are that marginally probative evidence will be given undue or preemptive weight by the jury, and that it would be inequitable to allow the proponent of the evidence to use it. Sclafani, 130 Mich App at 735-736. Prejudicial evidence under MRE 403 includes that which has a tendency to move the tribunal to decide on an improper basis including, but not limited to, an emotional one. People v Vasher, 449 Mich 494 (1995). Evidence which threatens MRE 403's fundamental goals of accuracy and fairness should not come before the jury. Vasher, 449 Mich at 501.

The trial court abused its discretion when it allowed Mr. Powell's edited

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deposition to be read to the jury because it was unduly prejudicial to Defendant. Throughout his entire deposition when questioned about Plaintiff and Ms. Schuman, Mr. Powell declined to provide any substantive testimony, choosing instead to assert his Fifth Amendment privilege against self-incrimination.

This Court has explained that the human tendency is to treat the claim of privilege as a confession of crime. In a civil case the negative inference which arises due to the assertion of the Fifth Amendment by a party may be capitalized and brought to the attention of the jury. In Re Ellis, 143 Mich App 456 (1985). The Fifth Amendment has been held not to forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them. Phillips v Deihm, 213 Mich App 389 (1993).

Here, Hurley was prejudiced by this "tendency" and inference because it was powerless to combat it by cross-examination or the admission of contrary evidence – including Mr. Powell's prior denial of both incidents.

Plaintiff capitalized upon the inequality of allowing into evidence Mr. Powell's serial assertion of his Fifth Amendment privilege and the negative implication which could be drawn from that privilege by repeatedly mentioning it during her closing argument. (Appellee's Appendix pp 128b-131b; 135b). Because of the limitation the trial court placed upon Defendant which originally granted its Motion in Limine, and the later reversal of its opinion and refusal to allow Hurley any manner to rebut the presumption raised by Mr. Powell's testimony, demonstrates the most blatant prejudice against Hurley.

If the fundamental goals of MRE 403 are accuracy and fairness, this rule was

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flagrantly violated when Mr. Powell's testimony was allowed into evidence. If this were a criminal case, Mr. Powell's testimony would never have come in because of its potential prejudicial effect. The prejudicial effect cannot be any less in this case, because Mr. Powell was intimately involved in the sexual encounter underlying Plaintiff's claim. It was blatant error for the trial court to allow Mr. Powell's testimony to be heard by the jury.

2. Allowing The Schuman Incident and its Subsequent Investigation Into Evidence Prejudiced Defendant, Violated MRE 404, and Violated Rules Regarding Subsequent Investigations.

Prior to trial, Defendant moved in limine to exclude evidence relating to the Schuman incident as well as Hurley's investigation, arguing they were irrelevant, hearsay and prejudicial. The Court disagreed, and ruled that evidence relating to the Schuman incident was relevant under MRE 404(b) to show opportunity and identity. (Appellee's Appendix p 146b). Additionally, without articulating a specific reason, the Court ruled that evidence relating to Hurley's investigation of both incidents would be allowed into evidence. (Appellee's Appendix pp 149b-150b).

Plaintiff made the most of the court's ruling. Over Hurley's objections, testimony regarding the Schuman incident was elicited at trial from Verdel Duncan, Donna Bueche and Ms. Schuman's deposition was read to the jury. (Appellee's Appendix pp 52b-59b; 7b-8b; 102b). Plaintiff capitalized on the Court's ruling regarding Hurley's investigations, eliciting testimony regarding the investigation from Verdel Duncan and Plaintiff. (Appellee's Appendix pp 40b-71b; 74b-77b). Mr. Powell was also questioned regarding both of these matters. The trial court also allowed Plaintiff to admit the investigation report into evidence. (Appellee's Appendix p 147b).

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Hurley was severely prejudiced by the trial court's ruling on this evidence. Not only was it compelled to defend Plaintiff's claim, but it also had to address the allegations against its employee made by Ms. Schuman. Although the court ruled that the Schuman evidence was only to come in on the issues of identity and opportunity, the scope of the testimony went well beyond these issues. Under these circumstances Hurley did not receive a fair and impartial trial.

Inasmuch as Plaintiff elicited evidence, from almost every witness, regarding the Schuman incident, the weight of the evidence was so heavy it prevented the jury from issuing a verdict based solely upon Plaintiff's claim.

The determination of liability should be based on the facts of the case at hand and not any other alleged acts. In Soto v Lapeer County, 169 Mich App 518 (1988), the plaintiffs claimed they should have been allowed to question the defendant doctor regarding a delivery in which he had participated one week before the at-issue birth. The plaintiffs claimed they should also be entitled to question one of the defendants at trial regarding a prior restriction to his medical license. Soto, 169 Mich App at 520-521. The trial court refused to allow plaintiffs to introduce this evidence at trial finding it irrelevant. In ruling on the issue of the prior delivery, the Court of Appeals stated:

> At that time, the trial court noted that admission of the evidence against defendant doctors would cause "tremendous prejudice" to them. **During the trial, the court reiterated that "the determination of liability shall always be on the facts of the case at hand, not on any alleged other negligent acts."** [Emphasis added] Soto, 169 Mich App at 521.

Additionally on this issue, the court explained that the trial court had acted within its discretion when it determined that in order to avoid diverting the jury's attention from the

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facts surrounding the at-issue birth, evidence of the prior delivery would not be admitted. Id.

When addressing Plaintiff's attempt to admit evidence regarding the physician's previous medical license restriction, the Court of Appeals agreed with the trial court that the evidence was not relevant to the determination of whether the physician in the case was negligent because it did not arise out of that case and apparently did not concern any procedures performed by the Defendant in the at-issue delivery. Soto, 169 Mich App at 522.

Under Soto, it is plain that the trial court abused its discretion by allowing evidence before the jury regarding the Schuman incident, its surrounding facts and investigation. The facts relating to the Schuman incident have no bearing on Plaintiff's claim. Instead of limiting the scope of this testimony to issues relating solely to opportunity and identity, the Court allowed the jury to hear details of the entire incident. The admission of this evidence was so prejudicial under MRE 403, it prevented Hurley from having a fair trial.

The trial court also abused MRE 404(b)(1) as the presumed basis for its original ruling. Under normal circumstances, evidence of a person's character through "other acts" is not admissible to prove that the person acted in conformity with his character on a particular occasion. The rationale of MRE 404 was set forth by this Court in People v Allen, 429 Mich 558 (1988), when it stated:

> In our system of jurisprudence, we try cases, rather than persons, and thus a jury may look only to the evidence to the events in question, not to the defendant's prior acts, in reaching its verdict. Allen, 429 Mich at 566-567.

Although there are circumstances under which character evidence may be admissible

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under MRE 404(b), the trial court must still assess whether the probative value of the evidence sought to be admitted is substantially outweighed by the danger of unfair prejudice. People v VanderVliet, 444 Mich 52 (1993).

Here, the Court stated that because neither Hurley, nor Mr. Powell, specifically admitted to his involvement in the encounter with Plaintiff, the Schuman incident was properly before the jury (Appellee's Appendix p 147b). However, if the point was to show opportunity and identity, as suggested by Plaintiff, not one reference to the Schuman incident was necessary. Plaintiff could have testified on her own that she picked him out of a series of photographs during the investigation process. Alternatively, Verdel Duncan could have been asked about showing the photographs to Plaintiff and he would have stated that she identified his photograph as part of the investigation. It is abundantly clear that Plaintiff's introducing the Schuman incident had nothing to do with identity or opportunity, but rather to prejudice the jury and make Hurley defend two cases at one time. Under these circumstances, the court abused its discretion when admitting this prejudicial evidence before the jury.

Finally, the trial court also inappropriately allowed evidence before the jury regarding the investigation of Plaintiff's claim by Hurley Medical Center. In doing so, the court ignored that the these investigations constituted hearsay that was inadmissible under any recognized exception to the hearsay rule.

Admission of hearsay, including facts and information learned in an investigation or contained in a report, is plain error. Jarecki v Ford Motor Co., 65 Mich App 78 (1975). There is no issue that the findings, opinions, impressions and conclusions of Defendant's investigations are statements made out of court which fall squarely within

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the hearsay definition found in MRE 801(c). Further, these statements are not an admission by a party opponent under MRE 801(b)(2), prior statement of witnesses under MRE 801(d)(1), and do not fall within any of the more than 30 hearsay exceptions set forth in MRE 803 and 804.

Plaintiff never argued at trial that Hurley's investigation, and any report generated through that investigation, fell within any of the recognized exceptions to the hearsay rule. Rather, Plaintiff merely argued that Hurley's investigation and report should come into evidence to show identity under MRE 404(b). (Appellee's Appendix pp 142b-144b). Even those cases cited by Plaintiff, however, show that evidence of "other acts" should be provided through testimony of actual witnesses, not hearsay. See, e.g., People v Crear, 242 Mich App 158 (2000).

The trial court never articulated its reason for allowing the investigation and report into evidence. (Appellee's Appendix p 150b). However, it was plain error to admit this evidence, which was unduly prejudicial to Defendant.

Moreover, the trial court again violated MRE 403 when admitting Hurley's investigation reports into evidence. First, this evidence was cumulative of testimony provided by other witnesses. MRE 403 clearly bars cumulative evidence. Second, the testimony was misleading because Hurley was precluded from putting the whole story – including Mr. Powell's denials of involvement – before the jury. Third, the report was hearsay which, due to the court's ruling, Hurley could not cross-examine regarding the totality of the investigation and report. Lastly, despite the court's ruling, the investigation and reports were not properly admitted under MRE 404(b)(1).

For the Plaintiff to suggest that the Court of Appeals erred by not considering the

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Schuman incident, therefore, ignores the fact that evidence of the investigation, the incident itself, and Mr. Powell's deposition were so obviously reversible error as to not deem it worthy of consideration. Of course, as a practical matter the Court of Appeals did not see fit to address this issue because the resolution of the *respondeat superior* issue was dispositive of the appeal. (Appellant's Appendix p 4a).

F. The Trial Court Committed Reversible Jury Instructional Error.

While also not reaching this issue, the Court of Appeals stated at page 8 of its Opinion, "curiously, the trial court refused Defendant's request for a "mere opportunity" instruction." (Appellant's Appendix p 11a). This was indeed curious.

Michigan law provides that when a party requests an accurate and applicable Standard Jury Instruction, the trial court must give it. MCR 2.516(D)(2); Johnson v Corbett, 423 Mich 304 (1985). If the jury instructions given do not adequately and fairly present the applicable law to the jury, error requiring reversal has occurred. Case v Consumers Power Co., 463 Mich 1 (2000).

Plaintiff's claim in this action is based upon battery, for which then SJI 2d 115.02 provided, in pertinent part:

> A battery is the willful or intentional touching of a person against that person's will [by another/by an object or substance put in motion by another person].

Rather than give the standard instruction, however, and over Defendant's objection (Appellee's Appendix pp 125b-126b), the trial court instructed the jury as follows:

> Plaintiff has the burden of proving that defendant's employee willfully and intentionally touched the plaintiff against the plaintiff's will, **that is, without her consent.**
>
> The plaintiff has the burden of proof that the acts alleged against the employee were committed against her will, **that**

is, without her consent.

> For there to be a valid consent in this case both of the following facts – factors need to be present. Plaintiff's consent must be voluntary and not the product of a cognitive impairment. [Emphasis added] (Appellee's Appendix p 139b).

The court's given instruction added new elements of consent, and cognitive impairment, to this claim. Hurley was prejudiced by this erroneous instruction as it implied to the jury that consent must be shown in order for Defendant to defeat Plaintiff's battery claim.

Hurley was further prejudiced when the trial court refused to provide an instruction on what it had previously ruled was applicable law in this case. When denying Defendant's Motion for Summary Disposition, the court ruled under Champion, supra, that Hurley could be held vicariously liable if the facts established that Mr. Powell was aided in accomplishing the alleged assault by the existence of his employment with Hurley. (Appellee's Appendix pp 226b; 241b-243b). In so ruling, however, the court also stated that in this context:

> I think Bozarth is correct; that the – the mere fact that there is a tort committed and that the employment situation offers an opportunity is not enough in and of itself. (Appellee's Appendix pp 226b; 240b).

Over Hurley's objection (Appellee's Appendix p 124b), the court determined to use the vicarious liability jury instructions, which employed the language in Champion, supra, and Restatement Agency, 2d, §219(2)(d). Moreover, and contrary to its prior ruling, the court denied Hurley's request for a "mere opportunity" instruction, which would conform with the court's summary disposition ruling (Appellee's Appendix p 127b).

The court's instructional error clearly prejudiced Hurley when charging the jury as

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follows:

> An employer cannot be liable for conduct of an employee outside the scope of the employee's employment unless... the employee was aided in accomplishing the wrongful conduct by the existence of the employment relationship. (Appellee's Appendix p 140b).

This instruction alone, without the "mere opportunity" instruction requested by Defendant, subjected it to a strict liability standard. Substantial injustice resulted to Hurley due to the legal inaccuracy/applicability of this instruction. *See also*, subsection (c), supra.

While the Court of Appeals did not need to reach this issue, the "curious" nature of the refusal to give the requested jury instruction should convince this court that Plaintiff's Application is ill-founded.

G. Because Plaintiff Failed To Offer A *Prima Facie* Case, and Because The Trial Court Erroneously Framed The Issue, Reversible Error Was Committed By Denying Defendant's Motion For Directed Verdict.

Plaintiff failed to prove a *prima facie* case for either cause of action pursued, battery or intentional infliction of emotional distress. The trial court's denial of Defendant's Motion for Directed Verdict at the close of Plaintiff's proofs was, therefore, erroneous.

For both causes of action, Plaintiff had the burden to present evidence in its case-in-chief, which is sufficient to establish a *prima facie* case, regarding each element of each cause of action being asserted. Karr v Hogan, 399 Mich 529 (1976). When a plaintiff fails to meet this burden, the defendant is entitled to a directed verdict. Zander v Ogihara Corp., 213 Mich App 438 (1995).

The alleged factual basis for both causes of action was solely the testimony of

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the Plaintiff in her case-in-chief. The claim was that Mr. Powell, the hospital's nurse's aide, engaged in two types of sexual activity with Plaintiff, both digital and oral. As to both claims, there would have to be evidence that this activity, if the jury believed it occurred, was against her will. *See*, former SJI 2d 115.02. Yet the sole evidence before this jury, which was from the Plaintiff herself, established quite the opposite! In quite specific cross-examination, the Plaintiff acknowledged and admitted to making very specific statements to the emergency room nurses requesting them to lick her vagina and did so while thrusting her pelvis up in the air. She made these statements and performed this action repeatedly and intentionally in order to get the nurses away from her and to prevent them from inserting a catheter. (Appellee's Appendix pp 88b-92b). In doing so, the Plaintiff testified that she was **not delusional**, but made those statements intentionally for a specific purpose. (Appellee's Appendix p 93b). There were a series of answers which clearly established that the Plaintiff initiated the sexual activity with Mr. Powell. (Appellee's Appendix pp 93b-94b; 96b).

Further, Plaintiff testified that at no time was she physically threatened in any way; nor did she ever say she would not participate, scream or attempt, in any way, to resist or get away (Appellee's Appendix pp 95b-96b).

The *coup de grace* was the ultimate admission that she in fact agreed to this alleged sexual activity!

> Q. My question right now is did you agree to have oral sex under the frame of mind that you were, whatever that was or the jury believes that to be, at that point in time when he approached you to have oral sex, you agreed to have oral sex with him, isn't that true?
>
> A. I did not disagree at that time.
>
> Q. Meaning you agreed.

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A. Yes. (Appellee's Appendix pp 97b-98b).

Officer Hanson, the Flint police officer who interviewed Plaintiff regarding her complaint, testified:

Q. Okay. Did you specifically ask Mrs. Zsigo if she was a willing participant in this event?

A. Yes, I did, sir.

Q. And what did Mrs. Zsigo tell you in response to that question?

A. She told me that she had. (Appellee's Appendix pp 118b-119b).

The entirety of this case is based solely upon Plaintiff's version and testimony of the events. The alleged perpetrator, Mr. Powell, was not a witness in Plaintiff's case-in-chief. There were no other witnesses to this alleged encounter. And in Plaintiff's own testimony, she established and admitted that she enticed Mr. Powell into this activity, was never threatened, did not resist in any way and, in fact, agreed!

The jury, therefore, had no basis from which to conclude that this activity was "against her will" or "constituted conduct which was outrageous and which was intended to inflict emotional distress." Plaintiff answers these charges by indicating that she was not in a competent frame of mind to "consent." Yet, there was not one scintilla of evidence before the jury which would have legally enabled it to come to the conclusion that she was legally incompetent to have initiated and agreed to this activity.

Plaintiff admitted into evidence Hurley medical records for the July 9, 1998 admission, which made reference to a diagnosis of "Bi-Polar Type I with psychotic features." Other records indicate that a Dr. Wilkerson involuntarily admitted Ms. Zsigo to Hurley at that time under the same diagnosis. **Plaintiff did not call to the stand any**

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psychiatric expert, however, nor even attempt to proffer lay testimony on Plaintiff's mental capacity and competence on the issue of voluntarily engaging in the sexual activity with Mr. Powell. The trial court correctly prevented Ms. Zsigo from giving opinions on that issue herself for obvious lack of foundation. (Appellee's Appendix pp 100b-101b).

The medical records, by statute, **cannot** be utilized to provide any evidence of legal incompetence. MCL 330.1489. In Michigan, before the presumption of competence, mental or legal, is removed in any way, a full-blown adversary hearing procedure is required. MCL 330.1492, et. seq. No court can find a patient incompetent merely on the basis of medical reports. Instead, the law will presume sanity, rather than insanity, and competency rather than incompetency. It further presumes that every man is sane and fully competent until satisfactory proof to the contrary is presented. In Re: Mahon, 344 Mich 213 (1956).

At trial, Plaintiff had a very detailed and specific memory of the sequence of events of her visit to the emergency department. She acknowledged intentionally being belligerent and physically resisting not only the police officers, but the nurses at Hurley. She did so, according to her, not in a delusional sense, but intentionally to keep them away. She acknowledged initiating and enticing Mr. Powell to sexual activity and not resisting it, although she had ample opportunity to do so. Most significantly, she acknowledged **AGREEING** to the sexual activity! There was simply nothing before the jury to allow it, legally, to conclude Plaintiff was not a willing participant. The medical record of that date making reference to her mental condition cannot, by statute, be utilized to undermine a presumption of competence. Our law recognizes that those with

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diagnosable mental conditions in our society remain legally competent to make decisions affecting their own lives.

Additionally, in reacting to Defendant's Motion for Directed Verdict, specifically regarding the element of whether the alleged sexual activity was "against her will," the court chose to frame the issue as to whether or not expert testimony was required to address the Plaintiff's mental capacity. (Appellee's Appendix p 103b). While asserting that when dealing with a bi-polar and possibly psychotic, manic episode, by definition a lay person would not have the foundation to give an opinion, Defendant's assertion was broader. Defense counsel took issue with the way the trial court framed the basis for the Motion for Directed Verdict and reasserted its position that the record was devoid of any testimony whatsoever, whether lay or expert, which would overcome the presumption of competence. (Appellee's Appendix pp 108b-110b).

When the trial court resumed the day after the motion, it denied the motion, citing for the first time Prosser & Keaton, Torts, p 114, Ch 4, §18. The court then relied upon Prosser's two-pronged definition of consent, stating there was a fact question as to whether or not Mr. Powell knew that some kind of abnormality, temporary or permanent, of the consenting person (Plaintiff) was at issue, irrespective of Plaintiff's competence to give consent. (Appellee's Appendix pp 106b-107b).

In addition to objecting to this definition being given as a jury instruction, Defendant asserted that it was both factually and legally irrelevant to this case. Testimony was clear and undisputed that it was the Plaintiff who initiated the sexual activity, not Mr. Powell. It was not the Plaintiff who was "consenting", but Mr. Powell.

The legal issue was whether or not there was evidence in Plaintiff's case-in-chief

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which put into dispute that Plaintiff was touched "against her will." There was no technical issue as to whether or not she "consented" as **she** initiated the activity.

It is for this reason that it was error for the trial court to revise SJI 2d 115.02, as well as inserting the words, "i.e., without consent" that did not appear in the standard instruction.

The trial court acknowledged there was no lay testimony on the issue of her mental competence. (Appellee's Appendix p 104b). There was no expert witness proffered by the Plaintiff either. The medical records concerning her admission on that date cannot be utilized to overcome the presumption of legal competence and mental competence per MCL 330.1489. There was no evidence presented to the jury, therefore, by which they could properly find that a battery, or an intentional infliction of emotional distress, had occurred.

Under this set of facts, Plaintiff failed to set forth a *prima facie* case, and the trial court committed error by failing to direct a verdict on behalf of the Defendant. Again, the Court of Appeals did not need to address this issue, but it underscores the futility of Plaintiff's argument.

II. THE TRIAL COURT AND PLAINTIFF'S INTERPRETATION OF RESTATEMENT AGENCY, 2d §219(2)(d) CONFLICTS WITH TRADITIONAL AGENCY PRINCIPLES AND WILL RESULT IN EMPLOYERS BEING SUBJECT TO ALMOST LIMITLESS LIABILITY IN TORT ACTIONS.

While it remains Defendant's contention that even if Restatement Agency, 2d, §219(2)(d) is applicable, the facts of this case do not give rise to its utilization by Plaintiff as supportive of the cause of action made, Defendant feels constrained to address, in some detail, whether Restatement Agency, 2d, §219(2)(d) should apply in Michigan,

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and to what extent. It is Defendant's belief that Restatement Agency, 2d, §219(2)(d), encompassing "aided by agency relation" liability, was intended to apply, and has traditionally been applied, to cases of **non-physical torts** involving reliance and deceit. To that end, the Costos, supra Opinion is *sui generis*, at best, and erroneous, at worst. In fact, Costos stands alone in applying aided by agency relation liability to cases involving physical torts where reliance is not an element of the tort. To this end, Costos conflicts with traditional agency principles and should not be applied in the Sate of Michigan, as the Court of Appeals recognized below.

Section 219(2)(d) provides that an employer may incur liability for the servant's tort if, "the [employee] purported to act or speak on behalf of the principal and there was reliance upon apparent authority, or [the employee] was aided in accomplishing the tort by the existence of the agency relation." There are two, related, distinct basis for vicarious liability found therein. Plaintiff here has not suggested that apparent authority is at issue but, instead, argues the aided by agency relation basis for vicarious liability. Both the apparent authority prong and the aided by the relation prong, however, apply to cases involving deceit, or misrepresentation, which involve reliance by the Plaintiff on the agency relationship.

Comment (e) to Restatement Agency, 2d, §219(2) demonstrates that both parts of that section properly apply to cases involving misrepresentation or deceit. The comment lists situations in which an agency relation enables a servant to cause harm, such as when a telegraph operator commits a tort by sending a false message or a store manager cheats his customers. Restatement Agency, 2d, §219, comment 3 (1957). These hypotheticals illustrate situations where a tortfeasor accomplishes a tort,

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"by an instrumentality, or through conduct associated with the agency status." Both situations also involve deceit, which the agent achieved in part by the plaintiff's reliance on the agency relationship. While the plain language of Restatement Agency, 2d, §219(2)(d) neither contains the "instrumentality" limitation nor confines the Section to cases involving reliance and deceit, limitations contained in comment (e) prevent the aided by relation basis for liability from potentially swallowing agency law's general scope of employment rule.

Of course, when viewed in isolation, the aided by agency relation basis for liability could embrace a wide array of cases. As courts have noted, in almost all vicarious liability cases, the mere "existence of the agency relation" aids the employee in accomplishing the tort because the agent often would not have committed the tort but for the responsibilities, duties, and knowledge gained from the existence of the agency relationship. Burlington, supra. Courts, however, typically explain that such a reading goes too far. Gary v Long, 59 F3d 1390 (DC Cir. 1995). The agency relation by itself could expose the employer to nearly limitless liability, involving situations that fall well beyond a fair assessment of the employer's responsibility.

Indeed, this is exactly what Plaintiff would seek this court establish as Michigan law.

There is nothing in any case, other than Costos, supra, to believe that the aided by agency relation liability would apply in cases that did not involve apparent authority, reliance or deceit. The First Circuit's novel approach in Costos, supra, which extended aided by agency relation liability beyond cases of deceit and reliance, nullified the traditional principles of agency law, inasmuch as the rape by the inn manager on a

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sleeping guest was clearly an act falling outside any actual or apparent authority and not involving either reliance or deceit. The obvious reading of the Costos Opinion is to make every tort committed outside the scope of employment the same as those committed within the scope of employment for purposes of *respondeat superior* liability against employers.

The Costos court greatly expanded the common law of agency by providing a cause of action under Restatement Agency, 2d, §219(2)(d) for cases lacking reliance or deceit. In no case cited by Costos, and indeed in **no other reported case**, does aided by agency relation liability go so far. The rules established in Costos may serve to swallow the traditional scope of employment requirement for *respondeat superior* liability. For these reasons, this court should not allow a similar holding in this case, which would have the same effect it did in Maine, which was to exorbitantly expand liability in the circumstances.

Instead, Defendant suggests that Restatement Agency, 2d, §219(2)(d) apply, if at all, to the type of situation extant in Champion, supra, which is to say supervisory authority over subordinates in sexual harassment type of cases. In those circumstances, it is clearly the "instrumentality" of the employment relationship itself between the supervisor and the subordinate which empowers the supervisor, through threats of loss of job, etc., which, under an ordinary reading of Restatement Agency, 2d, §219(2)(d), would constitute "aided in the agency relation." Courts have consistently referenced "misuse of supervisory authority" as the extra that would trigger the exception found in Restatement Agency, 2d, §219(2)(d). The mere existence of the agency relationship, therefore, without more, could not bring about aided by agency

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relation liability. Faragher v City of Boca Raton, 524 US 774 (1998); Salinas, 263 Mich App at 322-323.

As in Burlington, supra, the Supreme Court in Faragher, limited aided by agency relation vicarious liability to cases involving a supervisor's harassing actions. The court reasoned that in cases of sexual harassment, the "aid" may be the unspoken suggestion of retaliation by misuse of supervisory authority. Faragher, 524 US at 807. Unlike a co-worker who creates a hostile working environment, a supervisor who harasses has power over the conditions of an employee's employment. A supervisor's discriminatory acts, "necessarily draw upon his superior position over the people who report to him." Id., at 803. A supervisor's power to fire, hire, and set pay rates, can in effect prevent a victim of that supervisor's harassment from "walking away or telling the offender where to go." Id. A supervisor's harassing actions, then, are aided by an employee's hesitation to reject or report such acts, which in turn stems from the employee's reliance on the supervisor's ability to alter employment conditions.

Analyzing both policy and the language of Restatement Agency, 2d, §219(2)(d), the Supreme Court in Faragher sought to ensure that employers would not be "automatically" liable for harassment by a supervisor who creates the requisite degree of discrimination. Id., at 804. The Supreme Court's confinement of aided by agency relation liability to cases involving a supervisor's harassment shows that such liability requires much more than physical harm resulting in part because a mere employment relationship existed. Id., at 803. Such a view does not suggest that aided by agency relation liability could properly apply in a case like Costos, supra, where the intentional tort involved no element of reliance, deceit, or misuse of supervisory authority. Costos,

137 F3d at 49-50.

Likewise, here there was nothing to suggest there was any element of reliance, deceit, or misuse of supervisory authority, and Defendant again suggests this court would severely expand liability to all employers of this State by applying Restatement Agency, 2d, §219(2)(d) in such a broad way.

The Court of Appeals statement below, therefore, that the Restatement Agency, 2d, §219(2)(d) exception applies to actions in torts is, technically, accurate. The issue becomes the **type** of torts to which the Restatement Agency, 2d, §219(2)(d) exception should apply. Consistent with the United States Supreme Court's Opinions in Burlington, supra and Faragher, supra, the **only** cases in Michigan to which the Restatement Agency, 2d, §219(2)(d) exception should apply are those involving reliance, deceit, or supervisory authority. *See*, e.g., Borsuk v Wheeler, 131 Mich App 403 (1984).

Vicarious liability should not automatically follow from an employee's intentional physical torts, even in the most shocking and repugnant cases. Here, as in Costos, supra, the offender could not be subject to monetary damages. Undoubtedly, the jury in both cases wanted someone to incur liability for such heinous crimes. The trial court gave Plaintiff the opportunity here by applying the Restatement Agency, 2d, §219(2)(d) exception in such a way as to impose strict liability upon the Defendant and insure a large plaintiff verdict.

The lack of reliance by the Plaintiff and the involvement of an intentional physical tort, however, should preclude aided by agency relation vicarious liability in such a case. Even if the Plaintiff here had not initiated the sexual contact with Mr. Powell, the

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Supreme Court cases referenced above suggest that she could not have found refuge in Restatement Agency, 2d, §219(2)(d). Applying aided by agency relation liability in cases involving employee's intentional physical torts in this State would make Restatement Agency, 2d, §219(2)(d) law's broadest and most threatening catch-all.

Other than Costos, supra, Plaintiff has not cited this Court to any case, in Michigan or any other jurisdiction, where the Restatement Agency, 2d, §219(2)(d) exception was applied to an intentional physical tort. This case should not present the opportunity for this court to expand liability in Michigan in the manner Plaintiff contends should be done.

RELIEF REQUESTED

For these reasons, Defendant-Appellee, HURLEY MEDICAL CENTER, respectfully requests that this Honorable Supreme Court affirm the May 4, 2005, Opinion of the Court of Appeals, remand for entry of a judgment of dismissal, with prejudice, and award to it costs and attorney fees so wrongfully incurred.

Respectfully submitted,

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Dated: August 16, 2005